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Supreme Court of the United States

October Term, 1954

No. 747

IRENE L. FAIRBAIRN, as Administratrix of the goods, chattels and credits of ROBERT L. FAIRBAIRN, deceased,

Petitioner,

against

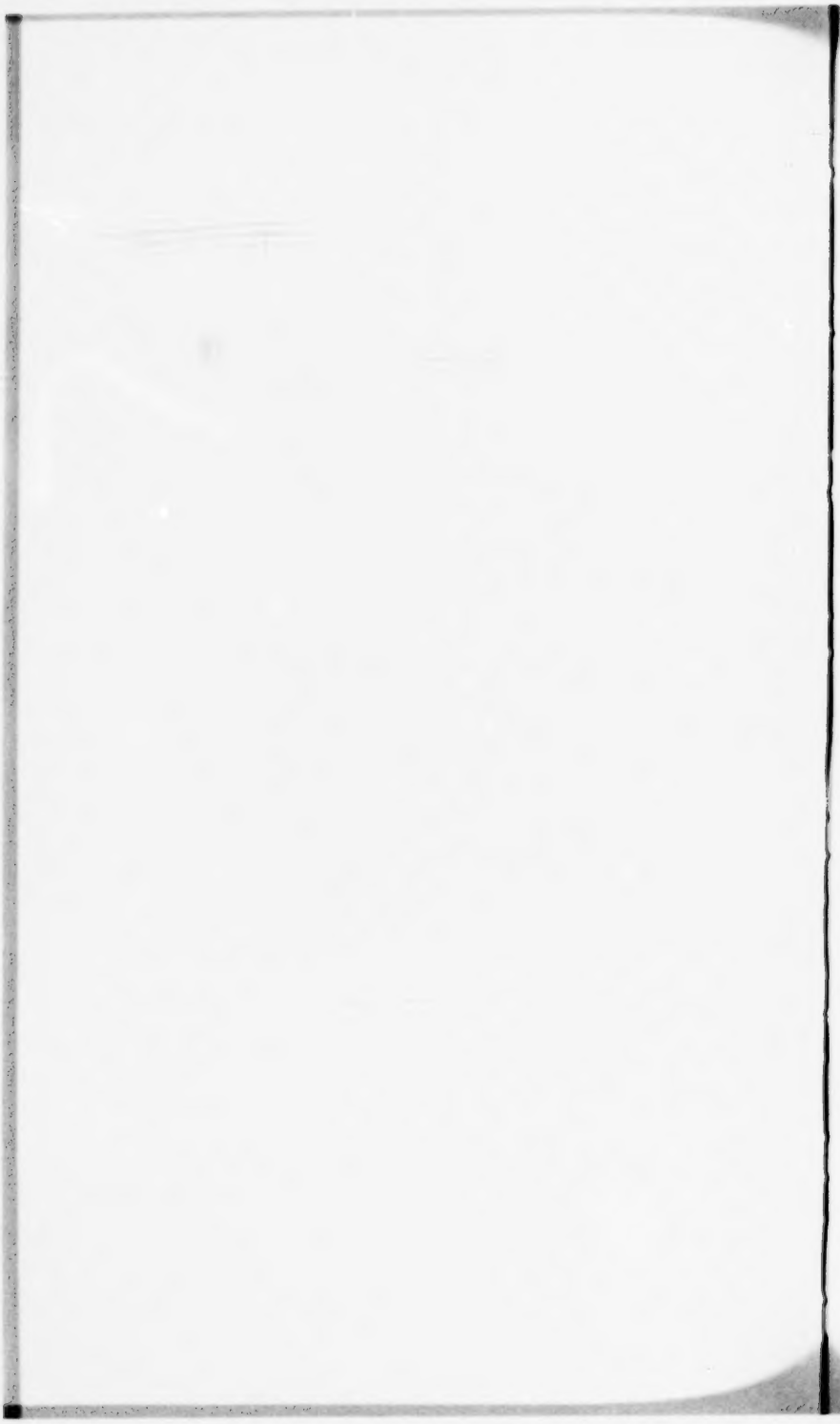
NORTH ATLANTIC AND GULF STEAMSHIP COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JACOB RASSNER,
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15 Park Row,
Borough of Manhattan,
City of New York.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
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Supreme Court of the United States

October Term, 1954

No.

IRENE L. FAIRBAIRN, as Administratrix of the goods, chattels and credits of ROBERT L. FAIRBAIRN, deceased,
Petitioner,

against

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Irene L. Fairbairn, as Administratrix of the goods, chattels and credits of Robert L. Fairbairn, deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled action on the 25th day of January, 1955.

Jurisdiction

Jurisdiction to review this action is based on 28 U. S. C. § 1254(1). The opinion below was filed on the 25th day of January, 1955.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit (No. 136—October Term, 1954); is officially reported in 218 F. (2d) 602.

The Decision Below

This action for damages for the wrongful death of Robert L. Fairbairn, Master of the S.S. ANDREW MOORE, on September 17, 1947, was predicated upon the provisions of the Jones Act, 46 U. S. C. § 688, and was instituted on March 27, 1950.

On January 12, 1954, the action came on for trial by jury before the Hon. Edward Weinfeld. During the course of said trial plaintiff attempted to place into evidence an illness report signed by chief mate Harry B. Hansen, who became the acting master of the vessel when the deceased Robert L. Fairbairn was first stricken by his fatal attack. The illness report was, in effect, the basis of plaintiff's action for defendant's failure to render prompt, adequate and proper treatment to the deceased from the first moment of the said attack to the time of his death some three hours later. As a result of the failure of an employee of the defendant to identify the said illness report, the plaintiff moved for, and was granted, a mistrial upon conditions which were complied with by plaintiff's counsel.

The action was then returned to the trial calendar for trial on May 21, 1954, was subsequently adjourned and set down for trial on June 1, 1954, before the Hon. John F. X. McGohey.

On May 26, 1954, pursuant to notice to the defendant, plaintiff made application returnable before the Hon. John C. Knox for an adjournment of the action until the Fall

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of 1954 by reason of the fact that the said Harry B. Hansen, who signed the said illness report, which was the basis and cornerstone of plaintiff's claim against said defendant, was at sea and would not be available as plaintiff's witness for the trial. Plaintiff's application was denied.

Trial by jury of the action commenced on June 1, 1954, before the Hon. John F. X. McGohey, a verdict being rendered for the defendant and judgment entered thereon June 7, 1954.

Petitioner duly appealed to the United States Court of Appeals for the Second Circuit, which Court, on the 25th day of January, 1955, affirmed the judgment of the Trial Court.

Reasons for Granting the Writ

The provisions of Amendments V and VII of the Constitution of the United States, holding that "No person shall be * * * deprived of * * * property, without due process of law" and preserving "the right of trial by jury" would appear to have been denied to petitioner herein.

Petitioner's application for adjournment on May 26, 1954, was supported by affidavits by Jacob Rassner, petitioner's counsel, and by oral argument before Hon. John C. Knox.

The Court, by its refusal to grant said adjournment, denied petitioner her constitutional rights:

a) in not adjourning the action until such time as an examination before trial of defendant could be taken, long after due notice.

b) by directing the action to trial in absence of testimony of the witness, Harry B. Hansen, acting Master in place of decedent, upon decedent's death.

The decision resolved about whether a report made by Hansen was correct and was later deliberately substituted by defendant-respondent for a second report.

Said first report had correctly stated a complete failure to treat the deceased, Master of a vessel, during an entire period of 2 hours, 55 minutes.

A second report was then filed, absolving defendant-respondent from liability. Both reports are annexed hereto and made part hereof (printed at pages 7 to 11).

Testimony of the signor of the reports, Hansen, was of the utmost importance to the proving of petitioner's case—all fully known to Chief Judge Knox at the time of the application.

Hence—the denial of the opportunity to produce Hansen was fatal to petitioner's cause of action.

Upon the application for the adjournment, the Court's attention was called to the fact that Hansen's absence at the trial would prove fatal to petitioner's cause of action (appendix 10a, 32a, 33a, 34a).

The statement by Chief Judge Knox that petitioner's counsel had neglected to take adequate steps to ascertain the whereabouts of the witness, Harry B. Hansen, and to obtain his testimony for the trial, is not supported by the record. The affidavits before Chief Judge Knox by Jacob Rassner, petitioner's counsel, establishes the absence of justification for the learned Court's ruling (appendix 3a-10a).

As to the circumstances of the original mistrial, we desire to point out that Jacob Rassner personally spoke to defendant's employee, Brooks, in charge of defendant's operations, who personally stated to Jacob Rassner that he would testify as to certain facts. Upon said witness appearing in Court, he was spoken to by Eugene Underwood, attorney for defendant-respondent, and thereupon

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Brooks reneged in his statement to Jacob Rassner, necessitating the motion for a mistrial.

The statement by Judge Edward Weinfeld, which obviously greatly influenced the decision of Judge Knox, was without justification. Judge Weinfeld's observation that the case was not properly prepared should be taken in the light of the fact that a witness reneged in his statement to Jacob Rassner.

The shortcoming of Jacob Rassner was in putting credence in the statement of Brooks and in not anticipating that Eugene Underwood would talk to Brooks in the courtroom just before Brooks took the stand, which conversation was followed by Brooks reneging in his previous statement.

It is true that Jacob Rassner should not have trusted Brooks and should have examined Brooks as a witness before trial and not relied upon his integrity to stand by his oral statement to Jacob Rassner.

Conclusion

The denial of the application for adjournment was tantamount to a denial to petitioner of her day in Court on the merits.

For the reasons set forth above, petitioner respectfully submits that this Honorable Court should issue its writ of certiorari to the United States Court of Appeals for the Second Circuit in this cause.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

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APPENDIX

First Illness Report

NORTH ATLANTIC & GULF STEAMSHIP COMPANY, INC.
120 Wall Street, New York 5, N. Y.

ILLNESS REPORT

NOTICE.—It is extremely important that the following questions be fully answered.
Patient should be questioned regarding details not known to person making report.

Name of Vessel Andrew Moore Flag American Voyage Number 18B

1.—The Patient

Name Robert L. Fairbairn
Address Bossert Hotel, Brooklyn, New York
Age 49 Nationality USA Married? Yes U. S. Citizen? Yes
Rating or capacity on vessel Master Where Born? England
Wages per month 616.00
Name and address of nearest relative or friend Wife, Irene, Bossert Hotel, Brooklyn, N. Y.

2.—The Illness

Date and hour illness first reported 0000—9/17/47
To whom reported Second Mate, Jessie James Shuck
Complaint and statement made by patient "Help—I'm Choking"

First Illness Report

Physical signs and/or symptoms pale in complexion, clammy TRR—946—no pulse—36—respiration in one hour had dropped to 12

3.—Treatment on Board and Final Disposition of Patient
Diagnosis **D. V.**
Describe in full all treatment given to patient on board vessel. There was no treatment given to patient aboard other than to keep him warm and lying down
By whom was patient treated on board vessel Purser
Was patient able to resume full duties on vessel No
Was patient sent to hospital on shore No
Had patient suffered similar illness before joining vessel Unknown

7.—Date on which voyage commenced 6/25/47

8.—From what port Baltimore, Md.

12.—Date on which patient was paid off 9/7/47

13.—Was substitute signed on Yes

14.—On what date 9/18/47

15.—Name of substitute Harry B. Hansen

16.—Name two prior employers of patient Unknown

17.—Remarks During the entire 2 hrs. & 55 min. pt. complained of choking up till the time he went into a coma. Once during the time he got out of bed and went into the head. Immediately afterwards he had a convulsion and bowel movements were continuous. Pt. died at 0255 9/17/47 was put ashore in Falmouth, Eng. PM was performed and immediate death put to "Virus Pneumonia". There were complications and no complete report was made. H. B. Hansen

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Second Illness Report

'acts

Name of Crew or Persons Who Know Fact
Concerning Illness and Treatment
on Board Vessel

Harry B. Hansen
Jessie J. Shuck
James A. Presnell
Charles A. Frey
Jay Gould

Second Illness Report

)MPANY, INC.

NORTH ATLANTIC & GULF STEAMSHIP COMP*. Y.
120 Wall Street, New York 5, N. Y.

ILLNESS REPORT

following ques-

NOTICE.—It is extremely important that the foll
tions be fully answered.
Patient should be questioned regardin
known to person making report.

rding details not

nerican Voyage

Name of Vessel Andrew Moore Flag Ameri
Number 18B

1.—The Patient

Name Fairbairn, Robert L.
Address Bossert Hotel, Brooklyn, N. Y
Age 49 Nationality English Married?
Citizen? Yes
Rating or capacity on vessel Master W
England
Wages per month 646.80
Name and address of nearest relativ
Wife, Irene, Bossert Hotel, Brooklyn,

N. Y.
ried? Yes U. S.
r Where Born?
lative or friend
klyn, N. Y.

Second Illness Report

2.—The Illness

Date and hour illness first reported 0005 GMT 9/17/47

To whom reported Second Mate—J. J. Shuck

Complaint and statement made by patient Called to bridge asking for help and saying he was choking

Physical signs and/or symptoms Cold clammy skin, Swelling and numbness of feet and ankles, and hands and arms, T-94.6—R. 36—P none obtainable

Diagnosis None given

3.—Treatment on Board and Final Disposition of Patient

Describe in full all treatment given to patient on board vessel Pt. was put to bed with hot water bottles applied to feet and hands. Several attempt were made to relieve possible congestion from throat

By whom was patient treated on board vessel Purser

Name and address of attending physican, if any none

Was patient able to resume full duties on vessel No

If patient was not sent to marine hospital, state reason The ship was two days from port at this time effort was made to return to port and land patient at hosp. but before this was possible pt. died.

Had patient suffered similar illness before joining vessel Unknown

4.—On what date did man Joined vessel on 6/10/47

6.—At what port Baltimore, Md.

7.—Date on which voyage commenced 9/25/47

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Second Illness Report

8.—From what port Baltimore, Md.

9.—Date on which voyage ended 3/10/47

10.—At what port New York

11.—Date on which crew was paid off for voyage 10/5/47

12.—Date on which patient was paid off 9/17/47 his wages ended

13.—Was substitute signed on Yes

14.—On what date 9/18/47

15.—Name of substitute Harry B. Hansen

17.—Remarks It was noticed by Mr. Hansen and by other officers on vessel that the late captain had considerable trouble walking and climbing ladders on the vessel. This was especially noticeable during the ship's stay in Rouen France. Other than his complaining of this condition there was nothing either noticeable or nothing else that he ever complained about. During the Autopsy in England a diagnosis was given to be Virus Pneumonia with complications, this was stated as being the actual cause of death

H. B. Hansen
(Signature of Master)

Jay Gould
(Signature of Officer)

Date 10/5/47

Name of Crew or Persons Who Know Facts Concerning Illness and Treatment on Board Vessel — Addresses

Jessie J. Shuck, Pinole, Calif.
Charles A. Frey, Albany, New York
James A. Presnell, Baltimore, Md.

Opinion of United States Court of Appeals for the Second Circuit

No. 136, October Term, 1954

Argued January 11, 1955 Decided January 25, 1955

Docket No. 23238

—o—

IRENE L. FAIRBAIRN, as Administratrix of the goods, chattels and credits of ROBERT L. FAIRBAIRN, deceased,
Plaintiff-Appellant,

vs.

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY,
Defendant-Appellee.

—o—

Before CLARK, *Chief Judge*, and FRANK and HINCKS, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, John C. Knox and John F. X. McGohey, Judges.

Plaintiff-administratrix, appealing from a verdict and judgment for defendant in her action under the Jones Act, 46 U. S. C. § 688, to recover damages for the death of her intestate, has assigned as her sole claim of error the denial by Chief Judge Knox of her application for an adjournment of the trial.

JACOB RASSNER, New York City (LOUIS COHEN, New York City, on the brief), for plaintiff-appellant.

EUGENE UNDERWOOD, New York City (BURLINGHAM, HUPPER & KENNEDY and JAMES W. LYNCH, New York City, on the brief), for defendant-appellee.

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PER CURIAM.

Here the trial judges have shown assiduity to protect the plaintiff's legitimate interests when inexcusably neglected by the lawyer of her own choosing; but there comes a time when the court must refuse further continuances out of respect for its own dignity and the need to get judicial business done. Nor is there anything to show that the ensuing trial was unfair or the result improper.

Judgment affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of January one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
Circuit Judges.

IRENE L. FAIRBAIRN, Administratrix,
Plaintiff-Appellant,

v.

NORTH ATLANTIC & GULF S.S. Co.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York,

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. DANIEL FUSARO,
Clerk.

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IN THE

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October Term, 1954
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IRENE L. FAIRBAIRN, as Administratrix of the goods, chattels and credits of ROBERT L. FAIRBAIRN, deceased,

Petitioner,

against

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

JACOB RASSNER,
Attorney for Petitioner.

SUPREME PRINTING CO., INC., 114 WORTH STREET, N. Y. 13, BEEKMAN 3-2320
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Petitioner,

against

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY,
Respondent.

—o—

PETITIONER'S REPLY BRIEF

Mr. Eugene Underwood in his reply brief has resorted to taking statements made by Judge Edward Weinfeld during the first trial, which statements, taken out of context do not accurately reflect the true situation.[1]

[1] In order to obviate any discussion with Judge Edward Weinfeld, petitioner's counsel voluntarily offered to pay for the expenses incurred by the defendant as a condition for a mistrial and personally assumed responsibility. Petitioner's counsel was guilty of fault in relying on the honesty of Brooks and in not anticipating that Mr. Eugene Underwood would talk to Mr. Brooks, after which conversation Mr. Brooks would have a change of attitude. This was all during the first trial and not during the trial of the case at bar. In view of Judge Weinfield's comment and as a point of personal privilege, petitioner's counsel submits that the reference made by Judge Weinfeld was to a motion and not to a trial, where the Court felt that the research of law was such that it required him to do further research, that but one client, to counsel's recollection, was represented before Judge Weinfeld prior to the first trial and that there was no case before Judge Weinfeld that had come to trial unprepared.

The displeasure of the Court in the first trial does not seem to be an adequate legal ground for denying a petition for certiorari predicated on constitutional grounds in the case at bar.

Plaintiff respectfully submits that the statements made by a trial court constitute dictum, not evidence.

The following facts are not subject to contradiction:

1—Respondent was in default in not appearing on an examination before trial pursuant to a notice duly served.[2]

2—If the notice of examination before trial was complied with it would have resulted in Hansen being produced by the respondent.

3—The acting master's report (Hansen's) if accepted by a jury would constitute liability and entitled petitioner to a verdict.

---

[2] September 15, 1950.

Burlingham, Veeder, Clark & Hupper, Esqs.,
27 William Street
New York, N. Y.

Att: G. Hunter Merritt, Esq.

Re: Irene L. Fairbairn, etc. v. North Atlantic & Gulf Steamship Co. Inc.

Gentlemen:

It is requested that you set forth the names and addresses of the chief mate and the purser in the above case. If both or either of them are still employed by the defendant, it is desired that they be produced for an examination before trial pursuant to our notice to examine the defendant.

With reference to the radiogram set forth in your letter of August 8, 1950, please state the exact time when said radiogram was issued.

Your early advices on this will be appreciated.

Very truly yours,

JACOB RASSNER
By: ROBERT KLONSKY

RK:l

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4—The edited report made by Gould did n did not entitle the petitioner to a verdict.

5—Implicit within the jury's verdict was was the fact that it accepted Gould's statement and reject rejected Hansen's statement.

6—Hansen was at sea on a vessel, in Ala in Alaskan waters, and due to arrive in San Francisco on June 2 June 20, 1954, at the time this case was reached for trial.

7—This contention was not an afterthough nought, but a direct statement to Judge Knox that, in the absen absence of Hansen as a witness, petitioner's rights would ould be seriously prejudiced.

Had petitioner's notice of examination btion been complied with, petitioner would have been in a positio osition to establish the genuineness and truth of Hansen's staten statement as to the cause of death of Fairbairn, petitioner's hus 's husband.

We humbly submit that the fact that a sea a seaman, particularly a master, who was an eye-witness to the to the material facts of the case, being at sea and not available fo able for a period of approximately three weeks, constitutes a vali a valid ground for an adjournment of the trial for the period eriod of such time. That the denial to a widow of an opportuni ortunity to produce the acting master as a fact witness in her h her behalf, constituted a denial of justice and consequently an tly an abuse of discretion, in violation of her Constitutional rig nal rights.

Respectfully submitted, ed,

JACOB JACOB RASSNER,
Attorney orney for Petitioner.

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HAROLD B. WILLEY, C

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Petitioner,

against

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EUGENE UNDERWOOD,
Counsel for Respondent,
27 William Street,
Borough of Manhattan,
City of New York.

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IRENE L. FAIRBAIRN, as Administratrix of the goods, chattels and credits of ROBERT L. FAIRBAIRN, deceased,
Petitioner,

against

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY,
Respondent.

—o—

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Question Presented

The only question presented by the petition is, Did the District Court err in refusing to grant petitioner a continuance?

Statement of the Case

This is an action to recover damages for the death of Robert L. Fairbairn who was master of respondent's steamship ANDREW MOORE. Fairbairn was stricken with his fatal illness while the ship was on the high seas at about 12:05 a. m. September 17, 1947 and died within three hours despite the ministrations of the other officers of the vessel pursuant to medical advices received by radio. A post mortem subsequently disclosed that his death was

due to acute haemorrhagic pneumonia and no claim was made that respondent was responsible for the contraction or the onset of the illness. The only claim of liability was for an alleged failure to treat adequately during the less than three hour period between onset and death.

The case first came on for trial on January 12, 1954. Petitioner called a doctor and testified herself. Petitioner's attorney then asked the Court to order respondent to produce several officers of the vessel, Hansen, Shuck, Presnell, Frey and Gould. The Court (Weinfeld, J.) said that he would issue whatever subpoena was required and permitted petitioner's attorney to call respondent's trial counsel to the stand and interrogate them as to the whereabouts of the men named (* R. 64-72). This testimony disclosed that two of them were expected to arrive in New York that evening. Thereupon petitioner's attorney asked for a mistrial (R. 72). Respondent's counsel offered to produce in Court the following morning the two witnesses who were then expected to arrive that evening although the Court pointed out that respondent was under no duty to do so. The motion for a mistrial was denied (R. 76-8). The Court thereupon dismissed the jury for the day and petitioner's attorney immediately renewed his motion for a mistrial on the ground that he was not prepared to make a *prima facie* case (R. 79-80). The Court condemned his conduct but granted the mistrial on condition that he (Mr. Rassner) personally pay the respondent $1,000 on account of its expenses in bringing witnesses from great distances to attend the trial (R. 80-7). The following colloquy discloses the situation:

> "(72) The Court: Why do you wait until the last moment to do all this?
>
> Mr. Rassner: If the Court pleases, I explained before—

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* R. refers to the original record of the District Court which was before the Court of Appeals but was not printed.

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The Court: You didn't explain anything to my satisfaction before, and I am frank to say for the record that this is typical of the manner in which so many cases in which you represent the litigants come into my courtroom. It is an unfair thing to have their rights asserted by you. You put the Court in the position of pulling your chestnuts out of the fire.

Mr. Rassner: May I ask for a mistrial, particularly in view of your Honor's comment.

The Court: You couldn't get it on that ground because the Jury may eventually pass upon the factual issues here. What is the ground on which you are asking for a mistrial?

Mr. Rassner: So as to properly safeguard a client's rights, and I am afraid that I haven't prepared the case in a way to give the client the best benefit of my services.

The Court: Isn't that your duty, and responsibility (73) and how are we going to get rid of the calendar if you keep on?

Mr. Rassner: Haven't I pleaded guilty to this?

The Court: It isn't a mater of your pleading guilty. Another one of the rights of the people you represent, as an attorney, is to see that the calendar moves without delay. On both counts, you haven't lived up to your responsibility.

Mr. Rassner: Judge Weinfeld, I have pleaded guilty to the fact.

The Court: I am not interested in your pleading guilty.

Mr. Rassner: I have not put this case in shape. I am fully to blame for it. I am sorry it happened. I can say no more" (Appellee's Appendix, p. 2a).

"The Court: I want to say to you, Mr. Rassner, I don't want this ever to take place before me again in any other case.

Mr. Rassner: You can rest assured it won't.

> The Court: Do you have any other witness to go ahead with?
>
> Mr. Rassner: I have one member of the crew who is due here tomorrow, but that wouldn't be enough. In other words, I just made a mistake on what I had.
>
> The Court: You make these mistakes too often to suit me in these cases in which you appear before me. On one of them, I had to do all the research myself not long ago—after it was submitted" (Appellee's Appendix, p. 6a).

Counsel's claim (Petition, pp. 4-5) that a witness was persuaded to change his testimony, thus necessitating the motion for a mistrial, is emphatically denied. Counsel told Weinfeld, J. that he had "assumed that the illness report would go into evidence" (Appellee's Appendix, p. 5a). The fact is that the witness referred to did not speak with Mr. Rassner because he had been warned against it "because it is not safe" (Appellee's Appendix, p. 15-a).

Three months later, on April 8, 1954, respondent gave notice that it would apply on April 12th to set the case down for trial again on May 21st. Respondent's application was granted without opposition from plaintiff (Appellee's Appendix, p. 11a).

On May 24th petitioner applied for a continuance on the ground of unpreparedness. Respondent immediately moved to dismiss the action for failure to prosecute. Knox, J., adjourned the matter for two days to permit petitioner's attorney to make a full affidavit concerning his attempts to get ready for trial and the matter came on for argument on May 26th. Petitioner based her application on her attorney's alleged inability to find Mr. Hansen, chief officer of respondent's vessel, so that he might testify at the trial. The attorney's affidavit showed that he had done nothing whatsoever to locate or produce Hansen

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between January 12th, when the mistrial was granted, and May 26th except to send out two routine inquiries not later than January 20th and to engage a correspondent attorney on the west coast whose activities to locate Hansen were such that the affidavit did not venture to describe them. The fact is that during most of the time between the mistrial in January and the application for further continuance in May Hansen was in the Union Hall in San Francisco waiting for a job (Appellant's Appendix, pp. 6a-10a and Appellee's Appendix, p. 16a).

Against the background of the January mistrial on precisely the same ground and the apparent fact that petitioner's attorney had done nothing during the intervening five months to obtain Hansen's testimony, the Court could do nothing but deny the application if it wished to keep any control over its calendars and to protect defendants from attempts to browbeat them into submission and settlement by keeping non-meritorious cases hanging fire while putting defendants to large expense in preparing for trial over and over again. In denying the application for a continuance Judge Knox said that petitioner's attorney had not made a diligent effort to locate Hansen but had waited until the last minute although the case had been pending for more than four years (Appellee's Appendix, p. 19a).

The case proceeded to trial and respondent brought four witnesses to New York from great distances to testify. These were Gould, the ship's purser who was brought from Los Angeles, Shuck, the second mate who was brought from a point near San Francisco, Frey, the chief engineer who was brought from St. Petersburg, Fla., and Presnell, the third mate who was brought from Seaford, Del. None of these had been in respondent's employ since the end of the voyage on which Capt. Fairbairn died.

During petitioner's case petitioner's attorney called Gould to the stand and had him identify the disputed so-

called illness report which petitioner's attorney had told Judge Knox upon the application for continuance that he needed Hansen to identify. Gould testified that he (Gould) had actually written the document and that Hansen had merely signed it. Petitioner's attorney then offered the so-called report in evidence. Respondent did not object to it; it was received in evidence and was thereupon read to the jury (Appellee's Appendix, pp. 25a-27a).

Thereafter Gould, Shuck, Presnell and Frey testified fully to their attempts to treat the master, to their sending a wireless message for medical advice, to their receiving such advice, to their ministrations to the master pursuant thereto, to their putting the ship about to head for the nearest port and to the master's death within less than three hours in spite of all their efforts. Gould's testimony was included in the record before the Court of Appeals (R. 106-39).

After a trial that consumed four days, the case was submitted to the jury and a defendant's verdict ensued.

The opinion of the Court of Appeals is printed at page 13 of the petition for certiorari. The Court held that petitioner's attorney had been "inexcuseably negligent". It further held that the trial judges had shown assiduity to protect the petitioner's legitimate interests and that under the circumstances, and out of respect for its own dignity, and the need to get judicial business done, the District Court had no alternative but to do what it did. Finally, the Court held that there was nothing to show that the trial was in any way unfair or the result in any way improper.

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POINTS

I. The granting or refusal of an ap[plication for a continuance is a matter of sound judic]ial discretion.

Isaacs v. *United States*, 159 U. S. 4[87, 489;
Fidelity Co. v. *Bucki Co.*, 189 U. S. [135, 143;
Valdes v. *Central Altagracia*, 225 [U. S. 58, 73;
Yoho v. *United States*, 202 F. 2d 24[1, 242 (9 Cir.);
Locke v. *United States*, 166 F. 2d 4[49, 450 (5 Cir.);
Gross v. *Williams*, 149 F. 2d 84, 86 (8 Cir.);
Mississippi Val. Struc. Steel Co. v. *National Labor Relations Board*, 145 F. 2d 664, [666 (8 Cir.).

II. There was no abuse of discr[etion.

Against the background of the January mistrial petitioner's attorney should have been unusually diligent in locating Hansen and taking his testimony. Although Hansen during most of that time was actually available, sitting in the Union Hall day after day in San Francisco, petitioner's attorney barely turned his hand toward obtaining his testimony—see the Statement, *supra* pages 4-5. There is nothing in the record to indicate, and it has never been asserted, that Hansen was in any way under the control of the defendant, or in its employ. In these circumstances the District Court had no alternative but to deny the motion for a continuance.

III. If there was error it was ha[rmless.

The sole reason advanced in support of the application for the continuance was that petitioner needed Hansen to prove the so-called illness report (Appellant's Appendix, p. 3a). At the trial, however, respondent produced Gould, the purser, who personally wrote the so-called report. Peti-

tioner called him to the stand, had him identify the document and then offered it in evidence. No objection was made and it was received in evidence and read to the jury (Appellee's Appendix, pp. 25a-27a). Inasmuch as both the paper itself and its author (Gould) were before the jury, petitioner cannot have been harmed by Hansen's absence.

IV. The petition for a writ of certiorari should be denied.

Respectfully submitted,

EUGENE UNDERWOOD,
Counsel for Respondent.

Dated: May 18, 1955, New York, N. Y.

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